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No. 99-1648

In The

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

CATHERINE INGLE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION TO OPPOSITION

Respondent Catherine Ingle ("Respondent" or "Ms. Ingle") opposes the Petition for Writ of Certiorari for the reasons stated in the Brief in Opposition No. 99-1379, *Circuit City Stores, Inc. v. Saint Clair Adams*. Respondent joins with Mr. Adams in urging this Court that, should the Petition be granted, *certiorari* review be limited to the First Question Presented by Circuit City Stores, Inc. ("Petitioner" or "Circuit City").

Ms. Ingle also raises the following distinct reasons why certiorari should not be granted to review the dismissal of Circuit City's appeal in her case.

II. NO JURISDICTIONAL AUTHORITY

Ms. Ingle's lawsuit was brought in federal court. Mr. Adams and Mr. Ahmed, on the other hand, brought their lawsuits in state court. The issue of federal court jurisdiction arose in those two cases when Circuit City brought original petitions to stay state court litigation and compel arbitration of the disputes. This Petition arises from an order of the United States District Court, Southern District of California, denying petitioner's motion to compel arbitration. Circuit City filed a notice of its intent to appeal the interlocutory order. Its appeal was dismissed.

The order for which review is sought in this case is interlocutory, not final. The orders questioned in *Adams* and *Ahmed* are *final orders* dismissing petitions to compel

arbitration. See Civil Rule 54(b). In *Ingle*, jurisdiction never passed from the District Court and remains there today. See *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). The appellate courts recognize the jurisdictional distinction. See *Matter of Arbitration Between Chung and President Enterprises*, 943 F.2d 225, 227-229 (2d Cir. 1991).

Due to the absence of finality and District Court's uninterrupted jurisdiction over the subject matter, this Court's jurisdiction over the matter is questionable, at best.

III. FACTUAL BACKGROUND

Ms. Ingle applied for the position of sales associate at Circuit City in September 1996. At the time of application, she was given forms and told where to sign. Ingle was not given an opportunity to read the forms she was told to sign. She was never offered the opportunity to "opt-out" of the compulsory arbitration program.[1]

Ms. Ingle was not shown any dispute resolution rules; no one in management explained them to her. She never saw the rules discussed as Petitioner's Exhibit B at any time she worked on the job nor was she advised of any changes in the rules.

Ms. Ingle twisted her back at work helping to transport a wide-screen television in December 1997. Her

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[1] Due to the absence of an appellate record, the facts stated are based upon facts stated in the complaint and declarations of Catherine Ingle and Michael Crosby (and exhibits to that declaration) filed in support of the opposition to motion to compel arbitration.

supervisor, whose sexual advances toward Ms. Ingle approached stalking, was angry that she rejected him. When Ms. Ingle returned to work in January 1998, she presented Anderson with a doctor's written instructions that her work hours and lifting be limited strictly. Anderson, though, assigned her to work up to 60 hours a week, with heavy lifting. Ms. Ingle reported the harassment to store manager Eric Gibbs. His statements, actions and inactions caused far greater damage, so Ms. Ingle reported the harassment to Circuit City through its "cool-line" and by contacting its Western Regional Manager. No one at Circuit City responded to this report by informing Ms. Ingle of the dispute resolution rules. No one gave her a claim form to file.

Ms. Ingle retained an attorney, her counsel of record. Circuit City's in-house attorney sent a copy of its purported dispute resolution rules in mid-April 1998. Ms. Ingle's counsel contacted the two leading alternative dispute resolution providers in San Diego, J.A.M.S./ Endispute ("J.A.M.S.") and the American Arbitration Association ("AAA"). He provided them with copies of Circuit City's arbitration agreement and rules. He inquired whether either firm would administer an arbitration under those rules.

J.A.M.S. cited "*Duffield*" and "other factors" to explain its decision not to administer the case. J.A.M.S. sent its governing policy and rules, "J.A.M.S./Endispute Policy on Employment Arbitration Minimum Standards of Procedural Fairness."

AAA stated firmly that it would arbitrate the Ingle/ Circuit City dispute only if the parties stipulated to be

governed by AAA's "National Rules for the Resolution of Employment Disputes." In May 1998 and again in July 1999, Ms. Ingle offered to arbitrate under those rules. Circuit City refuses to do so.

IV. PROCEDURAL HISTORY

Plaintiff filed her Complaint for Sexual Harassment [California Government Code ("Gov.C.") § 12940(h)]; Failure to Prevent Sexual Harassment [Gov.C. § 12940(i), (h)(3)]; Unlawful Employment Discrimination on the Basis of Gender or Physical Handicap [Gov.C. § 12940(a)]; Retaliation for Protesting Sexual Harassment [Gov.C. § 12940(f)]; Failure to Reasonably Accommodate Physical Handicap [Gov.C. § 12940(k)]; Gender Discrimination and Harassment [42 U.S.C. § 2000e]; Retaliation for Reporting Employment Discrimination [42 U.S.C. § 2000e] on June 21, 1999.[2] Defendant filed a motion to compel arbitration on July 16, 1999. The motion was based in part on the Declaration of Pamela Parsons and Exhibits A and B thereto. Plaintiff filed her response on August 16, 1999. The opposition was supported by declarations by Michael Crosby (with exhibits) and Catherine Ingle.

The motion was heard and denied by the late Honorable Edward J. Schwartz on August 30, 1999. (Transcript of Hearing, 8/30/99, is Appendix 1.) A written order was signed on September 21, 1999 and entered September 22, 1999.

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[2] A prior, more limited version of this complaint (Case No. 99 CV 0181J JFS) was filed on March 3, 1999 and dismissed for lack of subject matter jurisdiction on May 24, 1999.

Defendant filed its notice of appeal on October 5, 1999. Respondent filed her motion to dismiss the appeal on November 19, 1999. The motion to dismiss was granted on January 24, 2000.

V. REASONS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. THIS *CASE* IS NOT RIPE FOR SUPREME COURT SCRUTINY

This case is not a promising candidate for review because no ruling by this Court will determine whether Ms. Ingle's dispute with Circuit City should be arbitrated. Judge Schwartz based his district court ruling entirely on the Ninth Circuit's opinion in *Duffield v. Robertson, Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) [employer may not force employee to arbitrate employment discrimination claims as a condition of employment]. (See Appendix B to Petition; Appendix 1, pp. 20-22.) The ruling did not consider *Craft v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999) (*per curiam*) nor the issues addressed in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (*per curiam*) and *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (*per curiam*).

Even if this Court were to rule four-square in Circuit City's favor, it would only return the parties to the appellate court. The parties would have to designate a record, then brief the materially indistinguishable *Duffield* decision as well as Ms. Ingle's other challenges to enforcement of the "Associate Issue Resolution Program" ("AIRP"). The ultimate appellate decision will be in Ms.

Ingle's favor, as *Duffield* was a Ninth Circuit case. Certiorari review will prejudice Ms. Ingle by delaying resolution of her case on the merits without any likelihood that the ultimate ruling would be to compel arbitration.[3]

B. THIS *ISSUE* IS NOT RIPE FOR SUPREME COURT SCRUTINY

1. PETITIONER HAS OVERSTATED THE CONFLICT IN THE CIRCUITS SINCE AT LEAST THREE HAVE NOT YET STATED DECISIVE POSITIONS

Circuit City represents that "this broad reading of the FAA Section One exclusion by the Ninth Circuit directly conflicts with every other federal appellate court." (Petition, page 10.) This assertion, however, masks conflicts within three circuits.

In *United Food and Commercial Workers Local 7R v. Safeway Stores, Inc.*, 889 F.2d 940, 943-944 (10th Cir. 1989), the Tenth Circuit held that an employee could not confirm and enforce an arbitration award pursuant to the FAA because the arbitration agreement was part of a contract of employment. The court recognized that "[t]he Arbitration Act expressly excludes from its coverage 'contracts of employment of . . . any . . . workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1 (ellipse in

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[3] Circuit City would in fact have three separate appellate occasions to delay justice: the disposition of the issue presented here; a petition to review a subsequent Ninth Circuit decision that arbitration may not be compelled; and finally the decision on the merits of her harassment and discrimination claims.

original)." Nothing indicates that the employee, Cortez, was engaged in the actual movement of products in commerce. The *UFCW* holding was not addressed in *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998), a case cited by Petitioner. That opinion reads the FAA employment contract exclusion more narrowly.

The Fourth Circuit in *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064, 1067-1068 (4th Cir. 1993) noted a line of its cases that had excluded collective bargaining agreements, as "contracts of employment," from the FAA by force of Section One. Nonetheless, this precedent was ignored in *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997), and by Petitioner.

The Third Circuit in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1119-1120 (3d Cir. 1993) stated that " 'contracts of employment' are explicitly exempted from the FAA." A panel of the Third Circuit disavowed this view when it decided *Great Western Mortgage Corporation v. Peacock*, 110 F.3d 222, 226-227 (3rd Cir. 1997) and it was not mentioned by Petitioner.

2. RECENT SCHOLARLY EXCAVATIONS INTO CONGRESSIONAL RECORDS (DISCUSSED BY THE COURTS OF APPEAL IN *CRAFT* AND *KOVELESKIE*) PROVIDE NEW INSIGHT INTO CONGRESS'S INTENT AND UNDERSTANDING WHEN IT ENACTED THE RELEVANT STATUTORY PROVISIONS; THE ISSUE SHOULD PERCOLATE IN THE LOWER COURTS.

This Court would be better prepared to consider the issues presented in the Petition if it would allow these

circuits to clarify their respective constructions of Sections One and Two of the FAA. More specifically, as Mr. Adams reasoned in his Brief in Opposition, the recent scholarly research into the history of the FAA has only been considered by two courts, the Ninth in *Craft* and the Seventh in *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), *cert. denied*, 129 S.Ct. 44 (1999). Other courts should be permitted to evaluate the FAA in light of recent scholarship clarifying Congressional understanding and intent.

This Court prefers to exercise certiorari review only after an issue has been permitted to "percolate" through the lower courts. By allowing this issue to percolate, the remaining circuits (including those without settled positions) could then consider the new scholarship discussed in Mr. Adams' brief. The perceived conflicts may be resolved through this process. In any event, further consideration would distill and clarify the issue and focus this Court's review.

3. THERE IS NO FACTUAL AND DOCUMENTARY RECORD

The texts of the Petition and this Response highlight the logistical complications review would entail. The Petition's footnote 1 concedes the absence of any appellate record. Its citation to Rules of the United States Supreme Court ("Rule") 16.2 solves nothing. That rule merely directs this Court to request the record from "the court" having possession of it. Here, there are two courts but no record, only documents in files. The absence of an appellate record is a symptom of the malady: unripeness.

C. THE COURT OF APPEAL'S RULING DOES NOT INVOLVE *INTOLERABLE ERROR*

1. COURTS OF APPEAL SHOULD CONSTRUE FEDERAL JURISDICTION NARROWLY.

Circuit City's petition requests this Court to focus on the purported deprivation businesses will suffer if they cannot use 9 U.S.C. § 16 to appeal orders denying motions to compel their employees to arbitration. However, the issue is federal jurisdiction – whether original (as in *Adams* and *Ahmed*) or appellate (*Ingle*).

Federal courts are of limited jurisdiction which cannot be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). In fact, a matter is presumed to be *outside* a federal court's jurisdiction; the burden to establish federal jurisdiction falls upon the party asserting it. *Id.* For similar reasons, statutes purporting to bestow federal jurisdiction must be narrowly construed. See *Healy v. Ralta*, 292 U.S. 263, 270 (1934).

The Court of Appeal in *Craft* and its progeny, including this case, rules prudently and according to this Court's direction when it limits the statutory extension of federal jurisdiction. Its rulings to construe jurisdiction under the FAA narrowly, therefore, do not constitute intolerable error.

2. THE COURT OF APPEAL'S DISMISSAL IN THIS CASE IS NOT NECESSARILY BASED ON A "BROAD READING OF THE FAA SECTION ONE EXCLUSION"

Circuit City focuses its petition on the Court of Appeal's construction of 9 U.S.C. § 1, the "exclusionary" provision of the FAA. However, it overlooks the clearly stated basis for *Craft's* holding:

> "*Based on the wording of* § 2, the pre-New Deal understanding of the Commerce Clause, the legislative history of the FAA, and the suggestions gleaned from [*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)], we hold that the FAA does not apply to labor or employment contracts. . . . Accordingly, we have no jurisdiction over Campbell Soup's interlocutory appeal and this appeal is hereby DISMISSED." *Craft, supra*, 177 F.3d at 1094, emphasis added.

Craft is constructed specifically from the "coverage" provision of the Act, Section Two. The provision enforces written arbitration provisions "in any maritime transaction or a contract evidencing a transaction involving commerce. . . . " As Respondent discusses below, Circuit City chose to omit reference to this statute from its petition.

3. NO PUBLIC POLICY FAVORS MANDATORY ARBITRATION WHEN IMPOSED AS A CONDITION OF EMPLOYMENT BECAUSE SUCH AGREEMENTS ARE UNCONSCIONABLE AND UNENFORCEABLE

Petitioner relies heavily on the "strong liberal policy favoring arbitration." Congress certainly declared such a policy when it enacted the FAA. However, that policy extends only to the ground covered by the statute. The liberal policy arising from the FAA cannot be used as a bootstrap to drag uncovered transactions or contracts into the statute's coverage zone. See *Perry v. Thomas*, 482 U.S. 483, 489-490 (1987) ["Section 2, therefore, embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate is not part of a contract evidencing interstate commerce or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2."].

a. THE DRA IS UNCONSCIONABLE

Circuit City's arbitration agreement, known as the Dispute Resolution Agreement ["DRA"] is unenforceable.[4] Respondent in her District Court memorandum of points and authorities in opposition to Circuit City's motion to compel arbitration identified numerous legal, factual and policy arguments why arbitration should not be compelled.

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[4] Mr. Adams addresses the coverage issue in his Brief in Opposition, No. 99-1379.

Unconscionability is a common ground to revoke a contract or prove it invalid. The DRA contains so many limits on its employees' statutory rights that it is substantively unconscionable.[5] The manner by which the DRA was imposed on Ms. Ingle was procedurally unconscionable. The uncontroverted facts are that she wasn't allowed to read it and the document she saw at hiring in 1996 was different from the 1998 version Circuit City asks the federal courts to impose on her. A number of the deficiencies Ms. Ingle identified, particularly the requirement to "buy justice" have been held sufficient to invalidate arbitration agreements.

b. PUBLIC AND PRIVATE AGENCIES HAVE DENOUNCED COMPULSORY ARBITRATION OF EMPLOYMENT DISPUTES

Another indication that public policy disfavors mandatory arbitration as a condition of employment is that the Equal Employment Opportunity Commission ("EEOC") concluded, in EEOC Policy Notice No. 915:002, that "[t]he use of unilaterally imposed agreements mandating binding arbitration of employment discrimination

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[5] Respondent identified the following unfair provisions in her District Court opposition brief: (1) unfair cost to the employee/claimant; (2) improper time limits on back pay; (3) improper deductions from back pay; (4) improper time limits on front pay; (5) cap on punitive damage awards; (6) improper attorney's fee provision; (7) shortened statutes of limitation; (8) limits on discovery; (9) unfair provision to designate arbitrator; (10) limit on employee's access to court without limiting the company; and, of course, (11) no jury trial.

disputes as a condition of employment *harms both the individual* civil rights claimant *and the public interest* in eradicating discrimination." (Emphasis added.)

Respondent noted in her Brief that AAA and J.A.M.S. refused to arbitrate the Ingle/Circuit City dispute under terms of the DRA because as AAA's attorney wrote, Circuit City's DRA did not "substantially and materially conform their employment plan to the standards of the Due Process Protocol and the [AAA's] National Rules for the Resolution of Employment Disputes."

D. ADDITIONAL STATUTES INVOLVED; MISSTATEMENTS OF LAW AND FACT

Rule of the United States Supreme Court ("Rule") 15.1 instructs parties opposing certiorari to "address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted." Circuit City has misstated facts and law that could impact the nature of questions before the Court.

1. CIRCUIT CITY OMITTED ANY REFERENCE TO THE STATUTE *CRAFT* RELIED ON, 9 U.S.C. § 2

Circuit City has correctly identified four statutes implicated by the issues before the Court. However, it failed to identify 9 U.S.C. § 2, the "coverage provision" of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 (1994). It is the wording of this provision that the per

curiam opinion in *Craft v. Campbell Soup Company*, 177 F.3d at 1091-1094 relied upon specifically in its holding that "the FAA does not apply to labor or employment contracts." (*Id.* at p. 1094.)

Section Two reads:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

No analysis of the FAA – what it covers and what it doesn't – can ignore Section Two.

2. PETITIONER STATES LEGAL AND FACTUAL ISSUES ARISING FROM QUESTION 2 INACCURATELY

a. THERE IS NO CONFLICT BETWEEN *ADAMS* AND *AHMED*

Circuit City's petition in its footnote 3 (page 6) suggests that the holding in *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999) (*per curiam*) "appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (*per*

curiam)." It further suggests the Ninth Circuit was confused in its understanding of Circuit City's AIRP, specifically, whether it was compulsory or voluntary. A full explication of the facts demonstrates that the Ninth Circuit accurately perceived the legally significant distinctions between the circumstances in *Adams* and *Ahmed*.

Circuit City relates at page 7 that its AIRP was implemented in *March 1995*, that Mr. Ahmed was employed at that time, and that in April 1995 he received material giving him the choice to "opt-out" of the AIRP. He did not do so. (*Ahmed*, 195 F.3d at 1132.) The Court ruled that Mr. Ahmed's receipt of the materials and his decision not to opt-out constituted an agreement affecting "terms and conditions of employment," creating a contract of employment. (*Id.*)

Mr. Adams was hired in *October 1995*, some months after the AIRP was initiated. The six-page application he signed included a provision purporting to divert all claims and disputes to binding arbitration. (*Adams*, 194 F.3d at 1071.) Unlike Mr. Ahmed and other individuals employed when AIRP began, Mr. Adams was required to accept the program as a condition of being employed in the first place. The Ninth Circuit thus analyzed a different fact situation in *Adams*, finding that Circuit City's arbitration agreement itself set forth terms and conditions of employment, and thus was an employment contract. (*Id.*)

As Ms. Ingle argued in her motion to dismiss the appeal, *Adams*, not *Ahmed*, governed her case because she

was hired in *September 1996*. (Circuit City Petition, page 7.)[6]

b. MR. GILMER WAS NOT GOVERNED BY A CONTRACT OF EMPLOYMENT BETWEEN EMPLOYER AND EMPLOYEE

Circuit City argues that this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991), held in effect that an arbitration agreement between employer and employee, standing alone, was not a contract of employment in the meaning of 9 U.S.C. § 1. Petitioner misstates the Court's reasoning. Justice White's footnote reads, in pertinent part:

> "The FAA requires that the arbitration clause being enforced be in writing. See 9 U.S.C. §§ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, *the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchange, not with Interstate*. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. . . . " (Emphasis added.)

Petitioner's contention that the agreement in this case is indistinguishable from the U-4 agreement in

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[6] Should the Court grant certiorari, it need not reach this issue to decide Question 1.

Gilmer is the opposite of Circuit City's argument below. Circuit City contended in its District Court papers and at oral argument that its agreement was materially different from the U-4. It submitted below that Ingle's job at Circuit City was so different from a securities' broker's that the Ninth Circuit's holding concerning the U-4 arbitration provision in *Duffield v. Robertson, Stephens & Co., supra* (see Appendix B to Circuit City's Petition), did not apply. (See Appendix 1, p. 8.)

At page 15, the petition misstates the holding in *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) by stating the Seventh Circuit did not find "the agreement to arbitrate to be 'an employment contract.' " To the contrary, *Michalski* did not address at all whether the agreement in question was a "contract[ ] of employment" within the meaning of 9 U.S.C. § 1.

VI. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied. If the petition is granted, though, review should be limited to the First Question Presented.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CATHERINE INGLE,	)	
PLAINTIFF,	)	99CV1297-S
- V -	)	SAN DIEGO, CALIFORNIA
CIRCUIT CITY,	)	AUGUST 30, 1999
DEFENDANT.	)	10:30 A.M.

****

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EDWARD J. SCHWARTZ
UNITED STATES DISTRICT JUDGE

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[2] P-R-O-C-E-E-D-I-N-G-S

DEPUTY CLERK: ITEM NUMBER ONE ON CALENDAR, CIVIL CASE 99-1297, CATHERINE INGLE VERSUS CIRCUIT CITY ON FOR HEARING DEFENDANT'S MOTION TO COMPEL ARBITRATION.

MR. BERRY: GOOD MORNING, YOUR HONOR.

I AM REX BERRY OF THE LAW FIRM OF DAVIS, GRIMM & PAYNE ON BEHALF Of DEFENDANT AND MOVING PARTY CIRCUIT CITY STORES, INC.

MR. CROSBY: MICHAEL CROSBY APPEARING ON BEHALF OF CATHERINE INGLE, THE PLAINTIFF.

THE COURT: ALL, RIGHT. MR. BERRY.

MR. BERRY: MAY IT PLEASE THE COURT, THE PURPOSE OF THIS MOTION THIS MORNING IS TO COMPEL ARBITRATION OF A DISPUTE BETWEEN THE PARTIES BASED ON A WRITTEN AGREEMENT OF THE PARTIES TO ARBITRATE PRECISELY THESE TYPES OF DISPUTES.

MISS INGLE HAS FILED A LAWSUIT AGAINST CIRCUIT CITY CONTRARY TO THE TERMS OF THAT AGREEMENT. THIS MOTION IS PRESENTED TO YOU PURSUANT TO THE FEDERAL ARBITRATION ACT TO COMPEL ARBITRATION OF A DISPUTE.

THE F.A.A. MAKES VALID, ENFORCEABLE AND IRREVOCABLE PRIVATE AGREEMENTS TO SUBMIT DISPUTES TO ARBITRATION. IT REQUIRES THIS COURT TO ENFORCE THAT AGREEMENT IN THE

SAME MANNER THAT THIS COURT MIGHT ENFORCE ANY OTHER SORT OF AGREEMENT.

THE FACTS LEADING TO THE OBLIGATION TO ARBITRATE [3] ARE LARGELY UNDISPUTED BY THE PARTIES, AT LEAST, THE FACTS THAT WE BELIEVE REQUIRE ARBITRATION.

IN SEPTEMBER, 1996, MISS INGLE SIGNED THE CIRCUIT CITY DISPUTE RESOLUTION AGREEMENT AS PART OF THE JOB APPLICATION PROCESS. THE AGREEMENT THAT SHE SIGNED STATES THAT THE PARTIES AGREE TO SETTLE VIA FINAL AND BINDING ARBITRATION ANY AND ALL EMPLOYMENT-RELATED LEGAL DISPUTES.

AT THAT TIME, MISS INGLE ALSO EXECUTED WITH THE DISPUTE RESOLUTION AGREEMENT AN ACKNOWLEDGMENT THAT SHE WAS RECEIVING AND THAT SHE WOULD REVIEW THE DISPUTE RESOLUTION RULES AND PROCEDURES, THAT IS, THE RULES THE PARTIES AGREED TO USE FOR PURPOSES OF THE ARBITRATION.

THE DISPUTE RESOLUTION AGREEMENT STATED THAT SHE HAD RECEIVED AND WOULD READ THE DISPUTE RESOLUTION RULES AND PROCEDURES, OR THAT SHE MUST ASK FOR A COPY OF THEM PRIOR TO SIGNING THE AGREEMENT IF SHE WASN'T GIVEN ONE.

AT THAT POINT, MISS INGLE HAD A CHOICE. SHE HAD A CHOICE WHETHER TO VOLUNTARILY AGREE TO BINDING ARBITRATION OR ELSE SHE HAD A THREE-DAY PERIOD AFTER SUBMISSION OF

HER APPLICATION WITHIN WHICH SHE COULD WITHDRAW HER CONSENT TO ARBITRATION, WITHDRAW THE APPLICATION, AND PURSUE EMPLOYMENT WITH SOME OTHER ELECTRONICS RETAILER.

THE DISPUTE RESOLUTION AGREEMENT REQUIRES ARBITRATION OF THIS PARTICULAR DISPUTE BASED ON LEGAL CLAIMS BROUGHT BY MISS INGLE. SHE IS SUING FOR SEXUAL HARASSMENT [4] ARISING OUT OF HER EMPLOYMENT, EMPLOYMENT DISCRIMINATION BASED ON GENDER AND HANDICAP, RETALIATION AND FAILURE TO ACCOMMODATE A PHYSICAL DISABILITY.

NOW, CIRCUIT CITY, OF COURSE, DENIES EACH ONE OF THESE CLAIMS. BUT THE MERITS OF THOSE CLAIMS ARE TO BE ADDRESSED AND DETERMINED BY AN UNBIASED ARBITRATOR CHOSEN BY THE PARTIES WITH EQUAL SELECTION RIGHTS.

AS OF THE PRESENT COUNT, YOUR HONOR, 16 UNITED STATES DISTRICT COURTS AND TWO STATE COURTS HAVE ENFORCED THE DISPUTE RESOLUTION AGREEMENT AND EITHER STAYED OR DISMISSED LITIGATION BROUGHT CONTRARY TO THE DISPUTE RESOLUTION AGREEMENT; AND THAT INCLUDES ALL SEVEN CALIFORNIA FEDERAL COURTS THAT HAVE ADDRESSED THE ISSUE.

IN FACT, EVERY CALIFORNIA FEDERAL COURT THAT HAS ADDRESSED THE ISSUE HAS ENFORCED THE DISPUTE RESOLUTION AGREEMENT; ONE TIME OUT OF THE NORTHERN DISTRICT OF CALIFORNIA, FOUR TIMES OUT OF THE CENTRAL DISTRICT OF

CALIFORNIA AND TWICE OUT OF THE EASTERN DISTRICT OF CALIFORNIA.

NOW, ON FRIDAY AFTERNOON, I BROUGHT TO THE COURT'S ATTENTION A NEW DECISION THAT WE HAVE JUST RECEIVED FROM THE SOUTHERN DISTRICT OF OHIO, ANOTHER FEDERAL COURT, ENFORCING THE DISPUTE RESOLUTION AGREEMENT AND ADDRESSING VERY – IN A VERY SIMILAR FASHION MANY OF THE CLAIMS NOW RAISED BY MISS INGLE.

[5] THIS CASE PRESENTS THE FIRST OPPORTUNITY FOR THE SOUTHERN DISTRICT OF CALIFORNIA TO JOIN THOSE REMAINING CALIFORNIA DISTRICTS.

IN OPPOSITION, MISS INGLE HAS RAISED A NUMBER OF ARGUMENTS. THE FIRST SHE RAISED IS THE CLAIM THAT SHE NEVER SAW THE DISPUTE RESOLUTION AGREEMENT, DIDN'T READ THE DISPUTE RULES AND PROCEDURES, WHEN, IN FACT, YOUR HONOR, THE RECORD SHOWS THAT MISS INGLES SIGNED THE DISPUTE RESOLUTION AGREEMENT. IT HAS HER SIGNATURE ON IT.

AND THAT AGREEMENT SAYS, I HAVE RECEIVED THE DISPUTE RESOLUTION RULES AND PROCEDURES AND I AGREE TO READ THEM, AND IF I DON'T HAVE THEM, I AGREE TO ASK FOR A COPY OF THEM BEFORE I SIGN THIS DOCUMENT.

EVEN IF MISS INGLE DID NOT READ THE AGREEMENT, THAT FAILURE WILL NOT EXCUSE HER OBLIGATION TO ARBITRATE. AND THAT'S SET

FORTH IN THE *COHEN VERSUS WEBB BUSH NOBLE & COOK* CASE OUT OF THE NINTH CIRCUIT, WE CITED, AS WELL AS JUDGE JONES' RECENT OPINION IN THE *GOLENIA VERSUS BOB BAKER TOYOTA* CASE.

MISS INGLE NEXT ARGUES THAT J.A.M.S AND A.A.A. WILL NOT ENFORCE THE DISPUTE RESOLUTION AGREEMENT. AS A PRELIMINARY MATTER, WE DON'T THINK THERE'S ANY EVIDENTIARY BASIS FOR THAT OTHER THAN THE HEARSAY STATEMENT OF COUNSEL, BUT THE FACT IS, THE ASSERTION IS SIMPLY WRONG.

A.A.A. HAS, IN FACT, PROVIDED ARBITRATORS FOR 13 [6] SEPARATE ARBITRATIONS UNDER THE DISPUTE RESOLUTION RULES AND PROCEDURES; AND THAT'S SET FORTH IN THE DECLARATION OF MISS PARSONS THAT WE'VE SUBMITTED TO YOU.

J.A.M.S., TO OUR KNOWLEDGE, HAS NEVER BEEN ASKED TO SUBMIT ARBITRATORS FOR DISPUTE RESOLUTION.

THE ARGUMENT IN LARGE PART IS IRRELEVANT IN ANY EVENT, YOUR HONOR, BECAUSE THE DISPUTE RESOLUTION AGREEMENT ALLOWS THE PARTIES TO CHOOSE THEIR OWN ARBITRATOR. IT DOESN'T HAVE TO BE AN A.A.A. ARBITRATOR. IT DOESN'T HAVE TO BE A J.A.M.S ARBITRATOR.

THERE IS A DEFAULT VENDOR BY THE NAME OF RESOLUTE SYSTEMS THAT'S WELL KNOWN THROUGHOUT THE COUNTRY. BUT EVEN IF THE

PARTIES DON'T WANT A RESOLUTE SYSTEMS ARBITRATOR, THEY CAN AGREE TO AN ARBITRATOR AMONG THEMSELVES.

MISS INGLE NEXT CONTENDS THAT THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO EMPLOYMENT CONTRACTS; AND FOR THAT, SHE CITES THE NINTH CIRCUIT'S DECISION IN *KRAFT VERSUS CAMPBELL'S SOUP*.

AS WE'VE STATED, *KRAFT* DOESN'T HAVE ANY APPLICATION TO THIS CASE BECAUSE THE ARBITRATION AGREEMENT IS NOT PART OF AN EMPLOYMENT CONTRACT. IT IS A SEPARATE, STAND-ALONE AGREEMENT EXECUTED AT THE TIME OF HIRE.

IT APPLIES NOT ONLY TO EMPLOYEES. IT APPLIES TO APPLICANTS. IT APPLIES TO FORMER EMPLOYEES. SO IT IS NOT PART AND PARCEL OF AN EMPLOYMENT CONTRACT.

[7] THIS DISTINCTION WAS RECOGNIZED VERY RECENTLY BY DISTRICT JUDGE STOTLER IN THE CENTRAL DISTRICT IN THE *NODGE* DECISION THAT WE SUBMITTED TO YOU.

MISS INGLE NEXT ARGUES THAT THE NINTH CIRCUIT'S DECISION IN *DUFFIELD* WOULD PREVENT ARBITRATION OF THIS DISPUTE, OR AT LEAST, THE TITLE SEVEN ASPECTS OF THIS DISPUTE.

SINCE *DUFFIELD* WAS ISSUED IN MAY OF 1998, THREE CALIFORNIA DISTRICT COURTS HAVE CONTINUED TO UPHOLD THE DISPUTE RESOLUTION AGREEMENT.

DUFFIELD'S ONLY APPLICATION CONCEIVABLY COULD BE TO CLAIMS BROUGHT PURSUANT TO TITLE SEVEN OF THE CIVIL RIGHTS ACT OF 1964 BECAUSE CALIFORNIA COURTS HAVE STATED THAT AS FAR AS THE CALIFORNIA ANTI-DISCRIMINATION STATUTES GO, *DUFFIELD* HAS NO APPLICATION.

OUR POSITION IS THAT THIS LAWSUIT DOES NOT GO TO ANY VALID TITLE SEVEN CLAIMS, THAT THE PLAINTIFF HAS SIMPLY ATTEMPTED TO PLEAD AROUND, IF YOU WILL, THE RECENT DECISION OF DISTRICT JUDGE JONES WHICH DISMISSED THOSE SAME TITLE SEVEN CLAIMS AS BEING PROCEDURALLY FLAWED.

EVEN IF THOSE TITLE SEVEN CLAIMS WERE VALID, HOWEVER, *DUFFIELD* STILL WOULD NOT APPLY IN THIS CASE. THE NINTH CIRCUIT WAS CLEAR THAT ITS CONCERN IN *DUFFIELD* WAS OVER ARBITRATION AGREEMENTS THAT WERE, TO USE THE COURT'S TERM, "COMPULSORY IN EVERY SENSE OF THE WORD."

[8] IN *DUFFIELD*, THE CONCERN WAS THAT THE U-4 FORM THAT ALL BROKERS HAVE TO SIGN PRIOR TO BEING A BROKER IN THE UNITED STATES CONTAINS THE ARBITRATION CLAUSE. IF A PROSPECTIVE BROKER DID NOT FILL OUT THAT U-4 FORM REGISTRATION, THEY COULD NOT BE A BROKER ANYWHERE IN THE COUNTRY FOR ANY EMPLOYER. IT WAS TRULY COMPULSORY IN EVERY SENSE OF THE WORD.

BY CONTRAST, HERE, THE ARBITRATION AGREEMENT AT ISSUE IS NOT COMPULSORY IN EVERY

SENSE OF THE WORD. MISS INGLE, AS I SAID, HAD A CHOICE. SHE COULD DECIDE, I DON'T WANT TO BE PART OF THAT ARBITRATION PROGRAM. THEREFORE, I'M GOING TO GO DOWN THE STREET AND WORK FOR THE GOOD GUYS. I'M GOING TO WORK FOR SEARS. I'M GOING TO WORK FOR ANOTHER EMPLOYER THAT DOES NOT REQUIRE THAT.

MISS INGLE THEN CHALLENGES THE ARBITRATION AGREEMENT AS HAVING INADEQUATE SUBSTANTIVE RIGHTS AND REMEDIES. SHE SAYS THAT IN ORDER FOR THE DISPUTE RESOLUTION AGREEMENT TO BE ENFORCEABLE, THE AGREEMENT MUST EXACTLY MIRROR THE PROCEDURES OF LITIGATION AND HAVE EXACTLY THE SAME REMEDIES.

NO STATE OR FEDERAL CASE SO HOLDS, YOUR HONOR. IN FACT, THE SUPREME COURT HAS RECOGNIZED THAT THERE ARE DIFFERENCES INHERENT BETWEEN ARBITRATION AND LITIGATION IN TERMS OF THE FORMALITY, THE SPEED AND THE BINDING - FINAL AND BINDING EFFECT OF THE PROCESS.

[9] THOSE DIFFERENCES WERE RECOGNIZED WITH APPROVAL BY THE UNITED STATES SUPREME COURT IN THE *GILMER* DECISION AND ALSO IN *WRIGHT*.

THE RELEVANT QUESTION, YOUR HONOR, IS WHETHER A PARTY EFFECTIVELY MAY VINDICATE HIS OR HER STATUTORY RIGHTS UNDER THE ARBITRATION AGREEMENT. AS LONG AS THOSE ARBITRATION PROCEDURES ARE BASICALLY FAIR AND

REASONABLE, THE PARTIES CAN AGREE TO ANYTHING THEY CHOOSE.

HERE, WE THINK THE DISPUTE RESOLUTION AGREEMENT MORE THAN MEETS THAT TASK, AND WE THINK THAT 17 COURTS HAVE AGREED WITH US.

THE DISPUTE RESOLUTION AGREEMENT WORKS IN FAVOR OF THE ASSOCIATE IN A NUMBER OF WAYS. CIRCUIT CITY ADVANCES ALL THE COSTS OF ARBITRATION SUBJECT TO REALLOCATION BY THE ARBITRATOR.

AN ASSOCIATE CAN LIMIT HIS OR HER EXPOSURE FOR ARBITRATION COSTS TO ONLY THREE PERCENT OF THEIR MOST RECENT YEARLY INCOME. THAT IS, IF THE ASSOCIATE MADE $20,000 LAST YEAR, THEY CAN LIMIT THEIR TOTAL EXPOSURE FOR FEES RELATED TO ARBITRATION TO $600.

THE ASSOCIATE, IF THEY PREVAIL, THEIR FILING FEE IS RETURNED TO THEM. THAT DOESN'T HAPPEN IN COURT.

IF THE ASSOCIATE PREVAILS, EVEN ON A COMMON LAW CLAIM, A CLAIM OF SLANDER OR A CLAIM OF BREACH OF CONTRACT, THEY'RE ENTITLED TO RECOVER THEIR ATTORNEY'S FEES. THAT IS [10] SOMETHING NOT AVAILABLE TO THEM IN COURT AS WELL.

A MUCH LOWER THRESHOLD EXISTS FOR ASSOCIATES TO RECOVER THEIR ATTORNEY'S FEES THAN IS ALLOTTED TO THE EMPLOYER.

THE STATUTE OF LIMITATIONS IS EXTENDED FOR THE ASSOCIATE ON CERTAIN CLAIMS SUCH AS TITLE SEVEN CLAIMS. IT MATCHES THE AVAILABLE STATUTE OF LIMITATIONS UNDER MANY OF THE DISCRIMINATION STATUTES IN CALIFORNIA. IT ALSO MATCHES THE DISCRIMINATION STATUTE OF LIMITATIONS AVAILABLE UNDER SECTION 1981 IN CALIFORNIA.

ARBITRATION ALSO REMOVES THE ADMINISTRATIVE HURDLES THAT THE PLAINTIFF HAS TO GO THROUGH FOR PURPOSES OF BRINGING A TITLE SEVEN CLAIM. AS THE COURT WELL KNOWS, PRIOR TO BRINGING A TITLE SEVEN CLAIM, THE PLAINTIFF HAS TO FILE A CHARGE OF DISCRIMINATION WITH THE E.E.O.C., HAS TO OBTAIN A RIGHT-TO-SUE LETTER, THEN MAY GO TO COURT.

NONE OF THAT IS REQUIRED UNDER ARBITRATION. AND IN THIS PARTICULAR CASE, IT'S RELEVANT BECAUSE IT WAS THE FAILURE TO TIMELY FILE A CHARGE OF DISCRIMINATION AND RECEIVE THE RIGHT-TO-SUE LETTER THAT JUDGE JONES RELIED ON IN DISMISSING MISS INGLE'S TITLE SEVEN CLAIMS PREVIOUSLY.

NONE OF THOSE HURDLES WOULD BE PRESENT IN ARBITRATION. MISS INGLES COULD COME RIGHT INTO ARBITRATION AND ARBITRATE THAT TITLE SEVEN CLAIM.

THE ASSOCIATE HAS THE ABILITY TO RECOVER THE FULL [11] ARRAY OF RELIEFS, INJUNCTIVE RELIEF, BACK-PAY, FRONT-PAY, COMPENSATORY

DAMAGES WITHOUT LIMIT, PUNITIVE DAMAGES WITH SOME LIMITS, AND ATTORNEY'S FEES.

BOTH DISTRICT JUDGE LEGGE OUT OF THE NORTHERN DISTRICT AND DISTRICT JUDGE LEVI OUT OF THE EASTERN FOUND THE DAMAGE PROVISION OF THE DISPUTE RESOLUTION AGREEMENT TO BE ADEQUATE AND ENFORCEABLE.

ANY REMAINING ISSUES OF UNFAIRNESS OF THE PROCEDURES OR REMEDIES WE SUBMIT WOULD BE PROPERLY SUBMITTED TO THE ARBITRATOR, AND NOT TO THIS COURT.

THE PARTIES ARE MUTUALLY BOUND TO ARBITRATE THE ASSOCIATE'S CLAIMS AND HAVE AGREE TO BE BOUND BY THAT DECISION.

IN ESSENCE, MISS INGLE ADMITS SHE SIGNED THE DISPUTE RESOLUTION AGREEMENT. SHE DOESN'T DISPUTE THAT THIS IS AN EMPLOYMENT-RELATED LEGAL DISPUTE. THERE IS NO LEGAL NOR FACTUAL BASIS WHICH EXISTS PRECLUDING ENFORCEMENT OF THE PARTY'S AGREEMENT.

AND THUS, THIS COURT SHOULD DISMISS OR STAY THE LAWSUIT BEFORE IT AND COMPEL THE PARTIES TO ARBITRATE THIS DISPUTE.

THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

ALL RIGHT. MR. CROSBY.

MR. CROSBY: THANK YOU, YOUR HONOR.

[12] I'M GOING TO TRY TO FOCUS ON THE ISSUES NOT DISCUSSED THOROUGHLY IN THE BRIEFS OR BOUGHT UP IN REPLY OR HERE TODAY.

BUT FIRST, I'D LIKE TO FOCUS THE COURT ON WHAT REALLY IS AT ISSUE HERE, AND THAT IS WHAT CONGRESS INTENDED WITH RESPECT TO THE COMPULSORY ARBITRATION OF TITLE SEVEN AND STATE STATUTORY DISCRIMINATION ACTIONS.

AND IT SAID WHAT IT THOUGHT THROUGH A COMMITTEE TO THE HOUSE LABOR & EDUCATION COMMITTEE. AND THAT STATED, AND IT'S QUOTE – IT'S QUOTED IN *DUFFIELD* AT PAGE 1196: "AMERICAN WORKERS SHOULD NOT BE FORCED TO CHOOSE BETWEEN THEIR JOBS AND THEIR CIVIL RIGHTS." AND THAT'S THE KEY ISSUE HERE TODAY.

WHAT THE CONGRESS INTENDS, THAT WAS THE FOCUS OF THE *DUFFIELD* CASE. AND IT CLEARLY CONCLUDED – AND THE NINTH CIRCUIT IS CLEAR ON THIS – THAT AN EMPLOYEE CANNOT BE COMPELLED AT THE OUTSET AS A CONDITION OF EMPLOYMENT TO ARBITRATE DISPUTES THAT MAY ARISE IN THE FUTURE, DISPUTES RELATING TO TITLE SEVEN OR D.F.E.H. CLAIMS.

IN THAT RESPECT, YOUR HONOR, THE DEFENSE HAS ARGUED THAT D.F.E.H. CLAIMS, F.E.H.A. CLAIMS ARE NOT SUBJECT TO ARBITRATION, AT LEAST, NOT COMPELLED BY THE *DUFFIELD* CASE. THAT IS NOT WHAT *DUFFIELD* SAYS.

IT SAYS JUST THE OPPOSITE. IT SAYS THAT THE NINTH CIRCUIT HAS SAID, BOTH IN THE *PRUDENTIAL VERSUS LAI* CASE AND [13] IN *DUFFIELD* THAT CONGRESS HAS MADE – HAS STATED IN TITLE SEVEN THAT STATE DISCRIMINATION STATUTES SUCH AS F.E.H.A. ARE INCORPORATED AS PART OF THE MECHANISM ANTICIPATED BY CONGRESS BACK IN 1964 FOR THE RESOLUTION OF DISPUTES ARISING FROM CIVIL RIGHTS, FROM EMPLOYMENT DISCRIMINATION; AND IN TWO PLACES IN THE *DUFFIELD* CASE, INCLUDING AT THE VERY END OF THE CASE, ON PAGE 1203, THAT D.F.E.H. CLAIMS AS WELL AS TITLE SEVEN CLAIMS ARE NOT SUBJECT TO COMPULSORY ARBITRATION.

I'D LIKE TO FOCUS ON SOME UNDISPUTED FACTS HERE, FACTS THAT HAVE NOT BEEN CONTRAVENED BY CIRCUIT CITY: ONE, THAT CATHERINE INGLE WAS PREVENTED FROM READING THE AGREEMENT.

THAT WAS STATED IN HER DECLARATION. IT'S WHAT SHE'LL SAY IN HER DEPOSITION. AND THAT MEANS THAT THERE WAS NOT A KNOWING WAIVER UNDER THE STANDARDS OF THE NINTH CIRCUIT SET FORTH IN CASES LIKE *PRUDENTIAL VERSUS LAI.*

SECOND, AND THIS IS EXTREMELY IMPORTANT AND I WILL ADMIT, I DID NOT ADDRESS IT DIRECTLY IN THE BRIEF. INGLE NEVER RECEIVED NOTICE THAT THERE WAS A CHANGE OF THE RULES. SHE SIGNED THEIR EXHIBIT A. BUT SHE NEVER SAW OR SIGNED OR COULD HAVE SEEN OR

SIGNED EXHIBIT B BECAUSE IT WAS NOT IN EXISTENCE WHEN SHE WAS HIRED AND WHEN SHE SIGNED THIS.

EXHIBIT B, AS I SAID, THEY'RE SLIPPING THIS IN HERE AS IF IT'S PART OF THE CASE. IT IS NOT. EXHIBIT A THAT SHE SIGNED, THE APPLICATION, SAID THAT WE MAY CHANGE OUR RULES IN [14] THE FUTURE UPON 30 DAYS NOTICE.

THERE IS NO EVIDENCE, YOUR HONOR, IN THE RECORD THAT THEY EVER GAVE 30 DAYS NOTICE TO ANYONE, MUCH LESS MISS INGLE, OR ANYONE IN THE STORE IN WHICH SHE WORKED.

SO THEIR ENTIRE MOTION TO COMPEL FALLS ON THAT EVEN IF THE COURT WERE GOING TO CONSIDER IT ON OTHER GROUNDS, BECAUSE THE RULES DO NOT GO INTO EFFECT ACCORDING TO THEIR OWN CONTENT.

THIRD, THIS WAS RAISED IN A NUMBER OF THE CASES, AND I DON'T THINK THAT THE COURT IS GOING TO RECOGNIZE CIRCUIT CITY'S REPRESENTATION OF 17 ORDERS OR EVEN THE ORDERS THAT ARE BEFORE THE COURT. I THINK THOSE ARE OUT OF CONTEXT AND I'VE STATED WHY I DON'T THINK THEY SHOULD BE CONSIDERED.

AND I'VE ALSO POINTED OUT AND I THINK IT'S OBVIOUS, WE DON'T KNOW HOW MANY COURTS HAVE NOT ENFORCED CIRCUIT CITY'S AGREEMENT. THEY HAD AN OPPORTUNITY TO TELL US IN THE

DECLARATION OF PARSONS, IN THE SUPPLEMENTAL DECLARATION OF PARSONS, OR SOME DECLARATION OF MR. BERRY OR SOME DECLARATION OF IN-HOUSE COUNSEL, MR. HOSEY OR SOMEONE ELSE. WE HAVEN'T SEEN THAT.

WE KNOW THAT THE *DERRICKSON* CASE RULED AGAINST IT. THERE'S A CASE HERE IN THIS COURT IN THE SOUTHERN DISTRICT THAT HAS RULED AGAINST IT AND THEY HAVE CALLED – IT'S ALSO AGAINST CIRCUIT CITY, *JEANNIE KOONS VERSUS CIRCUIT CITY*. I'M NOT SURE OF ITS CURRENT STATUS BUT I KNOW THAT THE INITIAL [15] TWO RULINGS WERE NOT TO ENFORCE.

BUT THE POINT IS THIS: THE COURT CANNOT RELY ON SORT OF A PIG-IN-THE-POKE KIND OF ARGUMENT LIKE THAT.

IN THOSE CASES THOUGH, MANY OF THEM RELIED UPON THE OPPORTUNITY OF THE EMPLOYEE TO OPT OUT OF THE PROGRAM. MISS INGLE DID NOT EVER HAVE THAT OPPORTUNITY.

A COUPLE OF OTHER THINGS, THE A.A.A. ISSUE THAT WAS RAISED, I THINK THAT THE MOST REASONABLE CONCLUSION, YOUR HONOR, BASED UPON A.A.A.'S POSITION IN THIS CASE IS THAT THE CASES THAT IT'S ARBITRATED WERE BEFORE A.A.A. ISSUED ITS RULES SO THEY WOULD ONLY ADMINISTER UNDER THE DUE PROCESS PROTOCOL THAT'S BEEN PROVIDED WITH THE PAPERS.

I REALLY – I KNOW THAT THE ONE HERE LOOKED AT CIRCUIT CITY'S RULES AND SAID, NO,

IT'S INSUFFICIENT. THEY ARE INSUFFICIENT DUE PROCESS GUIDELINES.

ONE CASE THAT'S FAIRLY IMPORTANT, A NINTH CIRCUIT CASE, AGAIN, THAT HASN'T BEEN DEALT WITH, THE *GRAHAM OIL*. THAT STATES, FOR EXAMPLE, TRUNCATING THE STATUTE OF LIMITATIONS – WHICH I UNDERSTAND THEY CLAIM IT DOES NOT DO, BUT THEY'RE INCORRECT.

IT STATES THAT THAT'S ENOUGH TO END THE INQUIRY. THERE ARE JUST ANY NUMBER OF DEFICIENCIES OUTLINED IN THE BRIEF THAT I BELIEVE IN AND OF THEMSELVES ARE ENOUGH FOR THE CASE NOT TO BE ARBITRATED, TO FORCE ARBITRATION.

THE CLEAREST ONES ARE THE COST. THE FACT IS, MISS [16] INGLE DOES NOT HAVE TO PAY TO COME HERE. SHE DOES HAVE TO PAY IF SHE FOLLOWS CIRCUIT CITY'S RULES, IF SHE ARBITRATES UNDER CIRCUIT CITY'S RULES. AND THAT'S A REAL, REAL IMPORTANT DISTINCTION.

THE CASES *PALADINO, COLE, SHANKEL,* I THINK ARE LOOKING AT IT THE RIGHT WAY. THIS IS CHECK – THEY'RE TALKING CHECKBOOK JUSTICE. THEY CLAIM THEIR PEOPLE HAVE TO BE WILLING TO PAY MAYBE A LITTLE, MAYBE A LOT, BUT HAVE TO BE WILLING TO PAY WAY BEYOND A FILING FEE TO GET JUSTICE. AND I DON'T KNOW HOW TO DEAL WITH THAT OTHER THAN SAYING, THAT'S NOT THE AMERICAN WAY.

I THINK THAT IT'S IMPORTANT EVERY COUPLE OF MINUTES IN THIS CASE TO GO BACK TO THE BIG PICTURE; THAT IS TWO THINGS. THEY'RE MAKING A PERSON, A FORMER CHILIES WAITRESS WHO GETS A GOOD JOB AS A SALESPERSON AT CIRCUIT CITY – THEY'RE MAKING HER PAY FOR JUSTICE. IF SHE CAN'T PAY, NO JUSTICE.

SECOND, THEY WANT THE RIGHT TO WITHDRAW FROM THE AMERICAN SYSTEM OF JUSTICE: JUST PULL OURSELVES OUT. THEY DON'T WANT TO WORK FOR US, OKAY. BUT IF SOMEBODY'S GOING TO WORK FOR US, THEY'RE GOING TO WORK UNDER SOME OTHER SYSTEM OF JUSTICE.

I THINK THAT THE IMPACT OF THAT IS INESTIMABLE. AND THAT'S WHY I'M RATHER – I REMAIN SURPRISED THE COURT'S HAVE TAKEN A DIFFERENT POSITION, BUT I THINK THAT IN THE [17] NINTH CIRCUIT, WE CANNOT TAKE THAT POSITION. THE NINTH CIRCUIT HAS NOT TAKEN THAT POSITION.

SOME ISSUES RAISED BY MR. BERRY IN HIS ABLE PRESENTATION, I THINK THAT *KRAFT*, A NINTH CIRCUIT EN BANC DECISION – EXCUSE ME – PER CURIAM DECISION, THEY DECLINED TO SEND IT EN BANC – RELATES TO EMPLOYMENT CONTRACTS. OBVIOUSLY, THIS IS PART OF AN EMPLOYMENT CONTRACT.

THE LITTLE GLITCH OR CATCH HERE IS THAT IT MAY BE ONE THAT'S TERMINABLE AT THE WILL OF THE PARTIES. BUT A TERMINABLE, AT-WILL CONTRACT IS A CONTRACT.

AND *KRAFT* STATES THAT THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO EMPLOYMENT CONTRACTS, FLAT-OUT DOESN'T APPLY. THEY SAID THEY'RE COMING HERE UNDER F.A.A., AND UNDER THE NINTH CIRCUIT RULING IN *KRAFT*, THEY'RE OUT.

I THINK I HAVE DEALT WITH THE ISSUE OF THE SUBSTANTIVE RULES AND WON'T GO INTO THEM AGAIN.

WITH RESPECT TO *DUFFIELD*, THERE IS ABSOLUTELY NOTHING IN *DUFFIELD* THAT INDICATES THAT IT ONLY APPLIES TO THE U-4 AGREEMENT. *DUFFIELD'S* HOLDING ON THE FACTS ARE THAT U-4 IS NOT ENFORCEABLE BECAUSE IT REQUIRES THE ARBITRATION OF TITLE SEVEN AND D.F.E.H. CLAIMS. THAT'S THE REASON THAT IT'S UNENFORCEABLE, NOT BECAUSE IT GOES TO LICENSURE, ALTHOUGH CERTAINLY, THAT IS DISCUSSED.

THE COURT: WHAT ABOUT THE CONTENTION THAT *DUFFIELD* IS RESTRICTED TO A SITUATION, WHEREAS IN THAT CASE, IT [18] APPLIES UNIVERSALLY TO ALL PROSPECTIVE EMPLOYEES?

MR. CROSBY: I THINK THAT – I THINK THAT IF YOU WERE TO TAKE THE POSITION THAT THAT'S ALL THAT *DUFFIELD* APPLIES TO, I THINK YOU HAVE TO STEP BACK FOR A SECOND AND LOOK.

THE FOCUS OF THE *DUFFIELD* IS NOT THE U-4. THE FOCUS OF *DUFFIELD* IS THE LEGISLATIVE HISTORY OF THE 1991 CIVIL RIGHTS ACT AMENDMENTS. AND THE 1991 CIVIL RIGHTS ACT

AMENDMENTS, PARTICULARLY, SECTION 118, THEY DON'T SAY THAT THEY APPLY ONLY TO THE SECURITIES INDUSTRY OR ONLY TO INDUSTRIES WHICH REQUIRE LICENSURE OR ONLY INDUSTRIES WHERE YOU CAN'T GO TO SOME OTHER CASE.

SO THE FOCUS ON THE PARTICULAR FACTS OF *DUFFIELD* IS MISPLACED. THE PROPER FOCUS IS ON: WHAT DID CONGRESS INTEND? AND CONGRESS INTENDED THAT NO EMPLOYEE SHOULD HAVE TO WAIVE THEIR CIVIL RIGHTS TO GET A JOB. THEY STATED THAT.

THE COURT: THANK YOU.

MR. CROSBY: THANK YOU.

THE COURT: ANYTHING FURTHER, BRIEFLY, MR. BERRY?

MR. BERRY: ONLY IF THERE SPECIFIC QUESTIONS THAT THE COURT HAS.

THE ONLY OBSERVATION THAT I WOULD MAKE, YOUR HONOR, SIMPLY COMES FROM THE LANGUAGE OF THE AGREEMENT THAT WAS SIGNED BY MISS INGLE.

IT SAYS, "INCLUDED WITH THIS APPLICATION IS THE [19] CIRCUIT CITY DISPUTE RESOLUTION RULES AND PROCEDURES. YOU SHOULD FAMILIARIZE YOURSELF WITH THESE RULES AND PROCEDURES PRIOR TO SIGNING THIS AGREEMENT.

"IF THE RULES AND PROCEDURES ARE NOT INCLUDED IN THIS BOOKLET, YOU MUST REQUEST

A COPY FROM A CIRCUIT CITY REPRESENTATIVE PRIOR TO SIGNING THE AGREEMENT.

"YOU WILL NOTE THAT IF YOU SIGN AT THIS TIME, YOU DO HAVE THREE DAYS TO WITHDRAW YOUR CONSENT. YOU MAY, OF COURSE, TAKE THE PACKAGE WITH YOU AND RETURN IT SIGNED IF YOU WISH TO CONTINUE THE PROCESS."

AND THEN DIRECTLY ABOVE HER SIGNATURE, "I HAVE READ THIS AGREEMENT AND I UNDERSTAND THAT I SHOULD READ THE DISPUTE RESOLUTION RULES AND PROCEDURES OVER THE NEXT FEW DAYS."

MISS INGLE, AS I SAID, HAD A CHOICE. SHE AGREED TO ARBITRATE. AND WE'RE ASKING THE COURT TO ENFORCE THAT AGREEMENT OF THE PARTIES.

THANK YOU.

THE COURT: THANK YOU.

WELL, IN THIS CASE, THE DEFENDANT, CIRCUIT CITY, HAS FILED A MOTION TO COMPEL ARBITRATION OF THE PLAINTIFF'S CLAIMS UNDER THE FEDERAL ARBITRATION AGREEMENT.

OF COURSE, THIS IS A SUBJECT THAT'S BEEN THE FOCUS OF A GOOD MANY COURT DECISIONS IN VARIOUS JURISDICTIONS. WE HAVE HAD DISTRICT COURTS RULE ON IT.

[20] BUT I THINK IN THE NINTH CIRCUIT, WE NOW HAVE THE CASE OF *DUFFIELD VERSUS ROBERTSON STEVENS & COMPANY*, WHICH IS 144

FED 3D 1182, IN WHICH THE COURT HELD THAT AN EMPLOYER MAY NOT CONDITION EMPLOYMENT ON A WAIVER OF JUDICIAL REMEDIES UNDER TITLE SEVEN.

IN THIS CASE, WHEN ONE EXAMINES THE EMPLOYMENT APPLICATION, ONE FINDS IN PARAGRAPH TWO THEREOF THE FOLLOWING LANGUAGE: "THIS AGREEMENT REQUIRES YOU TO ARBITRATE. CERTAIN LEGAL DISPUTES RELATED TO YOUR APPLICATION FOR EMPLOYMENT OR EMPLOYMENT WITH CIRCUIT CITY."

NOW, I THINK IF IT HAD STOPPED THERE, THERE WOULD BE NO PROBLEM IN THIS CASE. BUT PARAGRAPH TWO OF THE EMPLOYMENT APPLICATION GOES ON, "CIRCUIT CITY WILL NOT CONSIDER YOUR APPLICATION UNLESS THIS AGREEMENT IS SIGNED."

NOW, THAT PLACES A PROSPECTIVE EMPLOYEE IN A RATHER DIFFICULT SITUATION. IF HE WANTS A JOB, IT MAY BE A JOB THAT'S PARTICULARLY FAVORABLE TO HIS SITUATION AND HIS QUALIFICATIONS, HE'S GOT TO, AS A COMPULSORY MATTER, AGREE TO WAIVE HIS RIGHT TO ORDINARY LITIGATION AND TO GO BEFORE AN ARBITRATOR WITH CERTAIN PROBLEMS THAT EXIST IN AN ARBITRATION SITUATION AS DISTINGUISHED FROM A PROCEEDING IN A FEDERAL COURT.

DUFFIELD DID INVOLVE A COMPULSORY ARBITRATION AGREEMENT WHICH CONDITIONED EMPLOYMENT ON THE WAIVER OF THE RIGHT TO

LITIGATE FUTURE EMPLOYMENT-RELATED DISPUTES.

[21] IN THIS CASE, THE DEFENDANT IS RELYING ON THE DISPUTE RESOLUTION AGREEMENT THAT THE PLAINTIFF SIGNED AS PART OF HER APPLICATION FOR EMPLOYMENT WHICH STATES THAT ANY FUTURE CLAIMS MUST BE ARBITRATED.

THE EMPLOYMENT APPLICATION, AS I HAVE INDICATED, EXPLICITLY STATED, PLAINTIFF WOULD NOT BE CONSIDERED FOR THE JOB UNLESS SHE SIGNED THE D.R.A.

I THINK THIS IS A COMPULSORY ARBITRATION AGREEMENT WITHIN THE DEFINITION OF *DUFFIELD*.

IF ONE EXAMINES THE *DUFFIELD* DECISION AT PAGE 1199, THE FOLLOWING LANGUAGE APPEARS: "IN VIEW OF THE FACT THAT THE CONTEXT, LANGUAGE AND LEGISLATIVE HISTORY OF THE 1991 ACT, TOGETHER, MAKE OUT A CONCLUSIVE CASE THAT CONGRESS INTENDED TO PRECLUDE COMPULSORY ARBITRATION OF TITLE SEVEN CLAIMS, WE THINK IT INESCAPABLE THAT FORM U-4 IS UNENFORCEABLE AS APPLIED TO SUCH CLAIMS.

"FORM U-4 COMPELS PRECISELY WHAT CONGRESS INTENDED TO PROHIBIT IN THE 1981 ACT, MANDATORY REQUIREMENTS UNDER WHICH PROSPECTIVE EMPLOYEES AGREE, AS A CONDITION OF EMPLOYMENT, TO SURRENDER THEIR RIGHTS TO LITIGATE FUTURE TITLE SEVEN CLAIMS IN A JUDICIAL FORUM AND ACCEPT ARBITRATION INSTEAD."

I THINK THAT IS THE VICE OF THE SITUATION THAT WE HAVE BEFORE US, THAT THIS WAS NOT SOMETHING THAT A PROSPECTIVE EMPLOYEE COULD EITHER AGREE TO OR WALK AWAY [22] FROM.

UNDER THE CIRCUMSTANCES, I THINK IT PLACED UPON A PROSPECTIVE EMPLOYEE, WHO PROBABLY SORELY WANTS THE JOB, A DECISION TO EITHER AGREE WILLY-NILLY, RELUCTANTLY, OR TO SIMPLY LAY DOWN AND ACCEPT A COMPULSORY ARBITRATION PROVISION.

ACCORDINGLY, THE MOTION BY THE DEFENDANT IS DENIED.

MR. CROSBY, WILL YOU PREPARE AN APPROPRIATE ORDER AND SUBMIT IT TO OPPOSING COUNSEL FOR APPROVAL AS TO FORM?

MR. CROSBY: I WILL, YOUR HONOR. THANK YOU.

MR. BERRY: THANK YOU, YOUR HONOR.

WOULD THE COURT BE WILLING TO HEAR JUST ONE MORE POINT?

THE COURT: WELL, ONE MORE POINT. HOW LONG A POINT IS IT?

MR. BERRY: IT WILL BE BRIEF.

THE COURT: ALL RIGHT.

MR. BERRY: I WOULD LIKE THE COURT TO CONSIDER THE APPLICATION OF *DUFFIELD* ONLY TO THE TITLE SEVEN CLAIM AS OPPOSED TO THE

REMAINING CLAIMS IN THE LAWSUIT. I THINK THE CALIFORNIA COURTS HAVE BEEN VERY CLEAR THAT THEY DON'T AGREE THAT *DUFFIELD* HAS ANY APPLICATION TO F.E.H.A. CLAIMS BROUGHT UNDER CALIFORNIA LAW.

THE COURT: WELL, I DON'T THINK THAT IS A NECESSARY [23] RESULT OF *DUFFIELD*, AND I DON'T THINK THE POSITIONS OF THE CALIFORNIA COURTS ARE BINDING ON THIS COURT.

THANK YOU.

MR. BERRY: THANK YOU, YOUR HONOR.

MR. CROSBY: THANK YOU, YOUR HONOR.

THE COURT: INCIDENTLY, COUNSEL, HAVE THERE BEEN SETTLEMENT NEGOTIATIONS IN THIS MATTER?

MR. BERRY: THERE HAVE NOT, YOUR HONOR.

THE COURT: LET'S SEE, WHO IS THE MAGISTRATE JUDGE?

MR. CROSBY: JUDGE STIVEN.

THE COURT: JUDGE STIVEN. I THINK IT MIGHT NOT BE AMISS FOR YOU, SINCE YOU'RE BOTH HERE, TO STOP DOWN AT JUDGE STIVEN'S CHAMBERS AND SEE IF YOU CAN'T ARRANGE A SETTLEMENT NEGOTIATION WITH HIM.

MR. BERRY: THANK YOU, YOUR HONOR.

MR. CROSBY: THANK YOU.

* * *

(HEARING RECESSED AT 11:05 A.M.)

REPORTER'S CERTIFICATE

I, ISRAEL VAN BRAMER, CERTIFY THAT THE FOREGOING IS THE OFFICIAL TRANSCRIPT OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER; AND THAT IT IS COMPLETE AND ACCURATE, TO THE REST OF MY KNOWLEDGE AND ABILITY.